No. 03-20-00129-CV

IN THE THIRD COURT OF APPEALS
AUSTIN, TEXAS

QATAR FOUNDATION FOR EDUCATION, SCIENCE AND COMMUNITY DEVELOPMENT,
Appellant,

v.

KEN PAXTON, TEXAS ATTORNEY GENERAL, AND ZACHOR LEGAL INSTITUTE,
Appellees.

On Appeal from the 200th District Court of Travis County, Texas
Trial Court Case No. D-1-GN-18-006240

UNOPPOSED MOTION FOR LEAVE TO FILE RESPONSE TO ZACHOR LEGAL INSTITUTE'S SUR-REPLY

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TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant Qatar Foundation for Education, Science and Community Development ("QF") requests leave to file the attached Response to Zachor Legal Institute's Sur-Reply. *See* App. A. As grounds for this request, QF shows:

1. Zachor filed a motion for leave to file its sur-reply on December 23, 2020. QF did not object to Zachor's motion for leave on the condition that Zachor would not object to QF's right to file a response to the sur-reply. Zachor does not oppose this motion.

2. This Court granted Zachor leave to file, and Zachor filed its sur-reply on January 4.

3. As appellant, QF requests the opportunity to respond to the arguments Zachor raised in its sur-reply, in response to QF's prior briefing.

4. QF's brief of appellant included 6,973 words; its reply brief included 6,507 words; and the appended Response to Zachor's Sur-Reply includes 2,684 words, for a combined total of 16,164 words. Together, QF's briefing is well under the 27,000-word limit for total briefing in the court of appeals. TEX. R. APP. P. 9.4(i)(2)(B).

5. QF's response to Zachor's sur-reply clarifies Zachor's misinterpretation of QF's argument regarding who may assert a sovereign immunity defense, explains that precedent (including authorities cited by both QF and Zachor)

supports QF's position that a purely private party may not invoke such a defense, and illustrates why nothing in Zachor's sur-reply alters the conclusion that QF has advocated since its original brief—that the right to assert a sovereign immunity defense to jurisdiction is the prerogative of arms of the State, not a private advocacy organization like Zachor.

PRAYER

For these reasons, QF prays that the Court grant this unopposed motion for leave to file the appended response to Zachor's sur-reply and for such further relief to which QF is justly entitled.

Respectfully submitted,

/s/ *Wallace B. Jefferson*

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CERTIFICATE OF CONFERENCE

I certify that I have communicated with Dale Wainwright, counsel for Appellee Zachor Legal Institute, who advised that Zachor Legal Institute does not oppose this motion.

/s/ *Anna M. Baker*
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On January 8, 2021, I electronically filed this brief with the Clerk of the Court using the eFile.TXCourts.gov electronic filing system which will send notification of such filing to the following (unless otherwise noted below).

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APPENDIX A

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SUMMARY OF ARGUMENT

Zachor's sur-reply contends Qatar Foundation ("QF") argues that only "governmental units" may assert sovereign immunity. That misses the mark. QF explained that "arms of the State" may assert immunity, including state officials and state employees sued in their official capacities. Reply Br. at 2-3. But those with no governmental ties at all—like Zachor—may not.

Zachor also claims QF has presented no authority on this subject. But QF presented several cases confirming that no private party, unless it is an arm of the State, may invoke immunity. Zachor's own cases make the same point.

Zachor contends that QF first made its sovereign immunity argument in its reply brief, necessitating Zachor's sur-reply. That is incorrect. In its opening brief, QF stated: "[I]t is the ***State's*** prerogative to assert a sovereign immunity defense," and cited two of the same cases it relied on in its reply. Br. Appellant at 22; Reply Br. at 3. Yet Zachor waited seven months after QF first presented this position to rebut it as a "fundamental error." Sur-Reply at 2. In sum, QF raised this issue early, reinforced it in its reply, and it is legally sound.

Zachor, a private advocacy organization, was not privileged to assert sovereign immunity as a basis for the trial court's supposed lack of subject-matter jurisdiction. Its last-ditch attempt to avoid this conclusion fails. For that reason and

a host of others discussed in QF's prior briefing,[1] the trial court's order dismissing this case for lack of jurisdiction was improper and should be reversed.

ARGUMENT

I. Only an "arm of the State" may assert a sovereign immunity defense to jurisdiction.

QF's opening and reply briefs established that it is the ***State's*** prerogative to assert a sovereign immunity defense to jurisdiction—not a private party that does not perform a public function. Br. Appellant at 22; Reply Br. at 3. Governmental units, state officials, state employees sued in official capacities, and other arms of the State may rely on a sovereign immunity defense to jurisdiction. But wholly private parties—like Zachor—may not.

A. Zachor misrepresents QF's argument.

Zachor argues that QF incorrectly posited that only "governmental units" may assert an immunity defense, because governmental employees also may do so in certain circumstances. Sur-Reply at 4. QF quoted *Smith v. Davis*, 999 S.W.2d 409, 416 (Tex. App.—Dallas 1999, no pet.), which holds that sovereign immunity "may only be invoked by a governmental unit of the State." Reply Br. at 2. Other courts likewise refer to sovereign immunity as a benefit bestowed on "governmental

[1] While QF maintains that Zachor was not privileged to assert a sovereign immunity defense to jurisdiction, QF explains in detail in its briefing that the Texas Public Information Act indeed authorizes, and waives immunity for, suits against the Attorney General by a party seeking to withhold information from disclosure, like QF here.

unit[s].” *See Univ. of the Incarnate Word v. Redus*, 602 S.W.3d 398, 405 (Tex. 2020) (citation omitted) (examining whether entity is a “government unit” “entitled to assert immunity in its own right”).

QF’s cases also showed that state officials and state employees sued in their official capacities may assert sovereign immunity. Reply Br. at 3 (citing *Tex. A&M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 846 (Tex. 2007) and *McCartney v. May*, 50 S.W.3d 599, 605-06 (Tex. App.—Amarillo 2001, no pet.)). That is why QF’s final argument on this point was that Zachor could not rely on sovereign immunity as a basis for dismissing QF’s suit because Zachor was “not an arm of the State.” Reply Br. at 3. *See also Redus*, 602 S.W.3d at 405 (analyzing whether entity’s underlying nature is congruent with an “arm of State government”) (citation omitted). QF accurately stated the law. It planted no “flag” restricting its analysis to *Smith v. Davis* and never asserted that only “governmental unit[s]” could assert sovereign immunity. Sur-Reply at 4.

B. QF’s cited authorities support its argument.

Zachor resists the notion that only arms of the State may assert an immunity defense to jurisdiction. Sur-Reply at 10. Here are the Supreme Court’s answers to that reticence: “The ***State*** may assert sovereign immunity from suit in a plea to the jurisdiction.” *Tex. Nat. Res. Code Conservation Comm’n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (emphasis added). A private entity that does not act as “an arm of

the State" ***cannot*** assert sovereign immunity in a plea to the jurisdiction. *Redus*, 602 S.W.3d at 401. The Court also has considered who may appeal from an interlocutory appeal that denies a plea to the jurisdiction "by a governmental unit," and concluded that "governmental units" and persons "sued in an official capacity" are entitled to do so. *Koseoglu*, 233 S.W.3d at 845.

QF also cited court of appeals cases questioning whether non-governmental defendants can rely on immunity defenses aimed to protect others as a shield to liability. Reply Br. at 2-3 (citing *Cantu Servs., Inc. v. United Freedom Assocs., Inc*., 329 S.W.3d 58, 64 (Tex. App.—El Paso 2010, no pet.) and *City of Alton v. Sharyland Water Supply Corp*., 145 S.W.3d 673, 682 (Tex. App.—Corpus Christi 2004, no pet.)). Zachor contends that these cases are not dispositive of its right to assert an immunity defense to jurisdiction because unlike the defendants in these cases, Zachor does not face "liability" in this suit.

The whole point of a sovereign immunity defense is to avoid suit altogether—the very result Zachor seeks here. In *Cantu*, the court questioned whether a non-governmental entity could assert an immunity defense in a plea to the jurisdiction—just as Zachor has done here. *Cantu*, 329 S.W.3d at 64. In *Sharyland*, the court upheld the trial court's denial of a plea to the jurisdiction filed on immunity grounds by non-governmental entities. 145 S.W.3d at 681. Contrary to Zachor's claim, the court specifically noted that the contractors who filed the plea were not

"governmental entities" and could not assert a city's "sovereign immunity" as their own defense. *Id*. at 681-82. These cases support QF's argument that non-governmental entities like Zachor are not entitled to assert an immunity defense as a means to avoid a lawsuit, regardless of whether those entities face "liability" or not.

C. Zachor's cases support QF.

Zachor highlights four cases on this issue. All support QF. The first, *Liberty Mutual Insurance Co. v. Sharp*, 874 S.W.2d 736, 738-39 (Tex. App.—Austin 1994, writ denied), holds that a governmental employee sued in his official capacity may validly raise immunity to establish the trial court's lack of jurisdiction. QF cited cases with similar holdings in its opening and reply briefs. Br. Appellant at 22 (citing *McCartney*, 50 S.W.3d at 605); Reply Br. at 3 (citing *Koseoglu*, 233 S.W.3d at 846; *McCartney*, 50 S.W.3d at 605-06).

Zachor next cites *McCartney*, 50 S.W.3d at 605-06, claiming the court "rightly held that governmental employees were entitled to summary judgment in their official capacities, based on their assertion of sovereign immunity, even though the state agency for whom they were employed was not a party to the suit." Sur-Reply at 6. QF cited *McCartney* for the very proposition that state employees sued in their official capacities may rely on a sovereign immunity defense. Br. Appellant at 22; Reply Br. at 3.

The third case is *Nueces County v. Ferguson*, 97 S.W.3d 205, 215 & n.11 (Tex. App.—Corpus Christi 2002, no pet.). There, the court, relying on *McCartney*, also held that a governmental employee may assert a sovereign immunity defense to claims against him in his official capacity, even if the governmental unit is not a party to the suit. Again, QF does not dispute that employees sued in their official governmental capacities may assert an immunity defense.

The fourth case is *Alcorn v. Vaksman*, 877 S.W.2d 390, 403 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (en banc). In *Alcorn*, the court held that state employees may assert sovereign immunity when sued in official capacities. QF agrees with this disposition, too.

In sum, the bulk of Zachor's sur-reply is consistent with QF's original and subsequent briefing—governmental employees may assert the sovereign immunity defense when sued in their official capacities. But how does that help Zachor? Zachor is a private "advocacy group based in the United States dedicated to combatting the spread of anti-Semitism." CR1:28. It is neither a governmental employee nor an entity acting in a governmental capacity. The actual governmental entity involved in this dispute—the Attorney General of Texas—has never asserted an immunity defense.

D. Courts are not required to address sovereign immunity *sua sponte*.

Zachor relies on authority holding that a court is "obliged to ascertain that subject matter jurisdiction exists regardless of whether the parties have questioned it." Sur-Reply at 3 (citing *Univ. of Tex. Sw. Med. Ctr. at Dallas v. Loutzenhiser*, 140 S.W.3d 351, 358 (Tex. 2004), *superseded by statute on other grounds by* Acts of May 25, 2005, 79th Leg., R.S., Ch. 1150 § 1, 2005 Tex. Gen. Laws 3783 (codified at TEX. GOV'T CODE § 311.034). But many of the cases Zachor cites for this proposition address other bases for lack of jurisdiction, like standing, that do not present the same complexities as sovereign immunity. *See Tex. Ass'n of Bus. (TAB) v. Tex. Air Control Bd.*, 852 S.W.2d 440, 445 (Tex. 1993) (addressing standing); *Waco Indep. Sch. Dist. v. Gibson*, 22 S.W.3d 849, 854 (Tex. 2000) (Hecht, J., dissenting) (addressing standing and ripeness); *Good Shepherd Med. Ctr., Inc. v. State of Tex.*, 306 S.W.3d 825, 837 (Tex. App.—Austin 2010, no pet.) (addressing standing). Lack of standing cannot be waived and must be raised by a court *sua sponte*. *See Garcia v. City of Willis*, 593 S.W.3d 201, 206 (Tex. 2019) (appellate courts are "duty-bound" to determine whether standing exists, "even when not urged by the parties").

The same is not true for sovereign immunity. The Texas Supreme Court recently has made clear that "sovereign immunity 'implicates' the trial court's subject-matter jurisdiction" but "does not necessarily equate" "to a lack of subject-

matter jurisdiction for all purposes…." *Engelman Irrigation Dist. v. Shields Bros., Inc*., 514 S.W.3d 746, 751 (Tex. 2017). *See also In re D.S*., 602 S.W.3d 504, 519 (Tex. 2020) (Lehrmann, J., concurring) ("[W]e have embraced the 'modern trend' away from labeling a requirement 'jurisdictional' in the true 'subject matter' sense."). This is because the "contours" of sovereign immunity and subject-matter jurisdiction are not "coextensive." *Engelman*, 514 S.W.3d at 755.

Sovereign immunity can be waived, while subject-matter jurisdiction cannot. *Engelman*, 514 S.W.3d at 751. And "while a court is obliged to examine its subject-matter jurisdiction on its own in every case," the Supreme Court has "'***never suggested that a court should raise immunity on its own whenever the government is sued***.'" *Id*. (quoting *Rusk State Hosp. v. Black*, 392 S.W.3d 88, 102 (Tex. 2012) (Hecht, C.J., concurring) (emphasis added)); *see* Br. Appellant at 22-23; Reply Br. at 4-5. *Engelman* rejects Zachor's argument that Texas law ***requires*** trial courts to determine whether sovereign immunity bars jurisdiction. Sur-Reply at 4. Zachor has not cited *Engelman*.

Engelman also refutes Zachor's doomsday scenario—that if parties like Zachor are unable to raise a sovereign immunity defense, trial courts will "decide matters in dispute without the power to do so" and will "render[] void orders," "distorting litigation between the parties, and wasting valuable public and private resources." Sur-Reply at 9. Sovereign immunity is not a valid basis for a collateral

attack: "Holding that sovereign immunity so implicates subject-matter jurisdiction that the final judgment against [a party] can be challenged by collateral attack in a later proceeding would run counter to the trend of Texas law and of American jurisprudence generally." 514 S.W.3d at 752. More practically, there is little reason why a party ***entitled*** to assert a sovereign immunity defense would not urge it.

E. *Sua sponte* consideration of immunity by the trial court here conflicts with the Supreme Court's recent holdings.

This Court has recently highlighted the Supreme Court's "more guarded…description of the interplay of jurisdiction and sovereign immunity" described in *Engelman* and recognized that the Supreme Court has "never suggested that a court should raise immunity on its own whenever the government is sued." *Tex. Dep't of Ins. v. Tex. Ass'n of Health Plans*, 598 S.W.3d 417, 424 n.2 (Tex. App.—Austin 2020, no pet.) (citation omitted).

A few months later, this Court affirmed its view that it could consider sovereign immunity *sua sponte* against a challenge that immunity had been waived on appeal. *See City of Austin v. Anam*, No. 03-19-00294-CV, __ S.W.3d __, 2020 WL 7759980, at *3 (Tex. App.—Austin Dec. 30, 2020, no pet. h.). But in that case, the City had raised the immunity issue before the trial court in a plea to the jurisdiction, *id*., and certainly had not acquiesced in jurisdiction, admitting that suit against it was specifically permitted by statute—as the Attorney General has done

here. *See* Br. Real Party at 2 ("The PIA provides jurisdiction for a private party to file suit to challenge an Attorney General letter ruling.").

In light of the Supreme Court's recent instruction regarding the loose interplay between immunity and jurisdiction, it would be curious indeed for a court to *sua sponte* find lack of jurisdiction on the basis of immunity when the only governmental entity involved in the suit has affirmatively agreed that the statute at issue authorized suit.

"It is one thing to characterize sovereign immunity as jurisdictional so as to provide a defendant with certain procedural advantages in an ongoing case, such as avoiding a waiver of the defense or allowing a challenge of the immunity ruling by interlocutory appeal." *Engelman*, 514 S.W.3d at 753. It is quite another to sacrifice long-held legal principles on immunity grounds. *Id*. Zachor's argument is an end-run around the Supreme Court's clear distinctions between immunity and jurisdiction—permitting a wholly private entity to argue for immunity on "behalf" of a governmental unit that does not challenge, and indeed acquiesces in, jurisdiction. That scenario turns the Supreme Court's recent precedent on this point on its head. Perhaps that is why *Engelman* makes no appearance in Zachor's sur-reply.

II. Zachor can try to challenge subject-matter jurisdiction; it just can't assert sovereign immunity.

Zachor claims that QF "seeks to preclude Zachor from defending its right to public information through its challenge to the jurisdictional basis of Qatar's lawsuit." Sur-Reply at 10. Zachor also argues that QF "asserts that *Zachor's raising of sovereign immunity is the reason* the trial court was precluded from considering its lack of power to adjudicate Qatar's lawsuit." Sur-Reply at 3. These exaggerated claims have no merit.

Zachor is welcome to—and has—asserted additional grounds for its plea to the jurisdiction that the trial court could have considered.[2] For instance, Zachor alleged that because QF did not name Texas A&M as a party to the suit, the trial court cannot grant meaningful relief. CR1:456. QF's briefing explains why that cannot possibly be a basis for dismissal, but does not contend that Zachor had no right to try it out. Br. Appellant at 24-30; Reply Br. at 22-27.

CONCLUSION AND PRAYER

Zachor's belated but dogged insistence that it may, as a purely private party, invoke a sovereign immunity defense runs directly counter to precedent. QF contends, on the merits, that Zachor has no legal right to acquire QF's proprietary

[2] Zachor points out that neither the Attorney General nor QF "questioned…Zachor's prerogative to file a plea to the jurisdiction" in the trial court. Sur-Reply at 2. Zachor had a right to file a plea to the jurisdiction, but it did not have a right to assert sovereign immunity as the basis for that plea.

information. QF is ready, willing, and able to fight that battle in the trial court. This Court should reject a sovereign immunity defense asserted by a private advocacy organization that has no public function entitling it to claim it is an arm of the State, and the Court should remand so that the trial court can consider the merits of this dispute, a course of action that both QF and the Attorney General support.

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